STATE OF MICHIGAN

SUPREME COURT

LINDA M. GILBERT,

Plaintiff-Appellee,

vs.

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court
Case No. 122457

Court of Appeals
Docket No. 227392

Lower Court
Case No. 94-409216-NH

BRIEF OF AMICUS CURIAE
THE CHAMBER OF COMMERCE OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY

MISCELLANEOUS

INTERESTS OF AMICUS CURIAE

1. The Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. Appellant DaimlerChrysler Corporation ("DaimlerChrysler" or "the Company") is a member of the Chamber, as are 3,260 other companies headquartered in the State of Michigan. Innumerable other Chamber members have substantial operations in the State. When this Court speaks on important matters in the area of employment law, its decisions have a direct and significant impact on these Chamber members. In addition, courts in other jurisdictions often look to the decisions of this Court as persuasive authority in interpreting their own statutes and common law doctrines. Thus, the Chamber and its members have a vital interest in the subject matter of this litigation.

2. The Chamber exists in significant part to represent the interests of its members in important matters before state and federal courts, Congress and state legislatures, and the independent regulatory agencies of the federal and state governments. The Chamber has sought to advance those interests, *inter alia*, by filing briefs *amicus curiae* in hundreds of cases of significance.

3. The decision below provides a nearly inexhaustible supply of reversible errors; DaimlerChrysler has described a great many, and the Chamber agrees with the positions advocated by the Company in its principle brief. Because so many errors are evident in the decision below, however, the risk exists that two of particular importance to the Chamber will fail to receive the prominence the Chamber submits they deserve: the mistaken conclusion that Petitioner had effective "notice" of the sexual harassment alleged by Appellee Linda Gilbert ("Gilbert"), and the manipulation of the compensatory damages remedy into a punitive weapon by the jury at the urging of Gilbert's attorney.

4. The Chamber's members take seriously their obligation to provide employees with a civil environment in which to work. These companies do not shrink from their duty to act reasonably in proscribing harassment, preventing harassment through education and well designed policies, and punishing harassment when it occurs.

The court below, however, articulated an unfair and unworkable standard for imposing "constructive notice" of harassment on employers and thus triggering the employer's remedial responsibilities. Employers cannot as a practical matter maintain the degree of workplace surveillance expected by the court of appeals, and should not be asked to do so as a matter of policy. While employers should be reasonably attuned to the conditions under which employees work — and must listen to and take seriously complaints registered by employees about those conditions — employers cannot reasonably be expected to engage in the sort of Orwellian snooping the decision below demands.

Just as it imposes unrealistic and unprecedented burdens on employers — the obligation to be all-knowing and all-seeing — the decision undermines public policy by eliminating any concomitant responsibility on victims of harassment. Here, Gilbert recovered for a series of alleged "harassing" incidents about which she failed to complain to her employer, indeed, incidents she refused to acknowledge when asked directly about them by DaimlerChrysler's human resources professionals. What is more, she *knew* who was responsible for the harassment at issue here, but when asked by the Company for that information, she claimed she did not.

The rule adopted by the court of appeals in this case thus simultaneously rewarded Gilbert for purposefully concealing facts that would have ended the harassment years earlier and punished the Company for failing to divine these facts through surveillance, handwriting analysis or other high tech means. With all respect, such a rule makes for bad law and worse policy.

5. Under Michigan law, damages are not available to punish or "make an example" of a defendant. Punitive, or exemplary, damages may exist, in rare cases, to make a plaintiff whole for injury to hurt feelings — "soft" but nonetheless real damages for which a plaintiff might otherwise go uncompensated.

In this case, however, Gilbert's counsel expressly, repeatedly, and unambiguously urged the jury to punish the Company, to "send a message" with its verdict clear "to Stuttgart." The jury complied with counsel's request, and returned a punitive award that is believed to be larger than any single-plaintiff sexual harassment verdict in American history, even though, as even the court of appeals was forced to concede, "the conduct at issue in this case [must be placed] somewhat lower on the continuum of harassment" than the most serious cases. Gilbert urged the jury to punish, and the jury returned an award so large that it can be viewed only as an attempt to do just that. The award must be vacated because damages of this sort are simply unavailable under prevailing law.

Even if damages of this sort were otherwise available under Michigan law, the judgment in this case could not stand because it would violate even the most elementary principles of due process as the Supreme Court of the United States has defined them[1]: (a) The award bears no relationship to DaimlerChrysler's culpability. The Company was liable, at most, for what the court of appeals found to have been an insufficiently aggressive investigation, not for the harassment itself. Negligence is never an appropriate basis for a punitive damage award, and no possible characterization of DaimlerChrysler's conduct in this case could justify a $21 million punitive damage award. (b) Even if the Company's investigation was deficient, it was within Gilbert's power to render the investigation utterly irrelevant; she could simply have told the Company what she knew. (c) Finally, the award was orders of magnitude greater than awards

[1] *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

in similar cases. Indeed, most cases on comparable facts either never get to a jury or result in judgments for the defense.

6. As the voice of American business, the Chamber is in a unique position to explain to the Court the practical implications of these badly mistaken conclusions by the court of appeals for the business community and for public policy.

STATEMENT OF THE CASE

Appellant, DaimlerChrysler Corporation ("DaimlerChrysler" or "the Company"), has provided the Court with an exhaustive statement of the relevant facts in its Brief on Appeal. The Chamber, however, seeks to address only two issues presented in the decision below, and the abbreviated Statement that follows recounts only those facts directly relevant to those issues.

1. Respondent Linda Gilbert works for DaimlerChrysler as a millwright. She claims that over a seven-year period, she was subjected to hostile conduct by her co-workers because of her gender. Using the procedures outlined in the Company's sexual harassment policy, Gilbert complained to her supervisors that:

- In May 1993, a lewd cartoon was anonymously left in her toolbox.
- A few days later, a picture of a male sex organ was left on her toolbox.
- In October, 1994, another cartoon was left on her toolbox.
- Within weeks, an article by "Dr. Ruth" Westheimer relating to sexual matters was taped to her locker.
- In March, 1995, a vulgar poem was posted on a bulletin board 20 yards from her work area. The poem was not about, or directed to, Gilbert.
- In September, 1997, a co-worker made a comment about the size of his penis in front of Gilbert and other employees.

The employee responsible for the last of these incidents received a formal reprimand, and, so far as the record reflects, he never again engaged in any improper conduct towards Gilbert. DaimlerChrysler investigated the other five incidents, all involving anonymous acts of misconduct. The Company interviewed every skill trades worker on Gilbert's shift (36 in all) and reinforced the Company's zero-tolerance harassment policy.[2] When Gilbert was interviewed during the course of these investigations, she was asked to provide any clues she might have regarding the identity of the responsible employee or employees. She was also asked by the involved human resources professional to describe *all* of the misconduct to which she had been subjected. Gilbert (a) claimed that she did not know who might have been responsible for the anonymous misconduct; and (b) failed to identify any other instances of misconduct.

2. When she answered these inquiries, however, Gilbert was *deliberately concealing* information vital to the Company's investigation. First, Gilbert acknowledged at trial that she knew who was responsible for the anonymous harassment. She decided not to tell DaimlerChrysler, she explained, because she was concerned that, had she identified those responsible, the Company would have fired them; Gilbert testified that she did not want to be responsible for these individuals losing their jobs.[3]

Second, Gilbert claimed before the jury that she had been the victim of an endless stream of additional incidents of alleged harassment about which she had never previously complained

[2] According to the court of appeals, Gilbert testified these interviews with her co-workers "[never] happened." *Gilbert v. DaimlerChrysler*, No. 227392, slip op. at 4 (Mich. Ct. App. July 30, 2002), Appellant's Appendix ("App.") Vol. I, p.61a. In fact, Gilbert admitted that these meetings *did* occur, and that during these sessions the Company "told [the co-workers] about repercussions, the sexual harassment and things like that." App. Vol. II, p. 958a (undisputed testimony).

[3] Thus, Gilbert did not utilize the Company's policy against harassment *precisely because she knew how vigorously the Company would respond.* She correctly understood the Company's zero-tolerance harassment policy and knew that the Company would take prompt and effective remedial action against those responsible. That, she testified, was a result for which she wanted no responsibility.

to the Company. Indeed, by the time her counsel delivered his closing argument, he was claiming that Gilbert had been subjected to 15,000 acts of harassment, or 14,994 more than she had reported to her employer. Although the Company's investigators asked Gilbert to describe all of the incidents of harassment to which she had been subjected, she *never* complained about these 14,994 incidents to the investigators or to her supervisors

3. The reported and unreported incidents were qualitatively different. The incidents Gilbert reported under the Company's harassment policy were, with one exception, pieces of paper left anonymously in or around Gilbert's work area. Despite intensive investigations, the Company was unable to identify those responsible for this anonymous misconduct.

The unreported allegations, on the other hand — all but a handful of the "15,000" instances to which her counsel alluded — involved one-on-one, face-to-face interactions between Gilbert and her co-workers. Most often, these incidents involved (a) name calling; (b) the use of sexual innuendo in conversation; or (c) Gilbert's colleagues refusing to help her do her job. In nearly every instance, Gilbert knew who had engaged in the offending conduct, but she never told the Company who was responsible for all of this misconduct.[4] Gilbert claimed at trial that these incidents were motivated by her gender, but she never complained about the conduct, much less connected it to her gender.

4. Nearly all of the harassment Gilbert allegedly suffered, then, could have been prevented, or at least punished, had Gilbert simply told her supervisors or the Company's investigators about her experiences. Gilbert could have told DaimlerChrysler who had called her vulgar names or made vulgar comments to her so that the responsible individuals could be disciplined (as happened with the one such incident she *did* report), but she decided not to do so.

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[4] As discussed *infra*, Gilbert ultimately did describe some of these incidents in her deposition, but the testimony came far too late for the information to have been of any value in DaimlerChrysler's investigation.

5. Although she made the deliberate judgment that she would not report these instances of misconduct to her supervisors (because, she said, she did not want anyone to be fired on her account), she nonetheless presented "expert" testimony at trial that these events were so profoundly disturbing to her that they had changed her brain chemistry in such a way that the harassment would ultimately kill her.

6. At the conclusion of the trial, Gilbert's counsel urged the jury to use its verdict to punish DaimlerChrysler — to make an example of the Company that would reverberate over two continents:

> [If your verdict is large enough, it] will be heard from the floor of that plant on Jefferson to the board room in Auburn Hills or Stuttgart. They will recognize that . . . you have spoken, and that this shall never, ever, ever, ever happen again . . . . [U]nless there is full and complete justice in this case, unless we ring the bell of justice loud enough and high enough in that tower of justice, after beating her down, after beating her down, after beating her down, after beating her down for seven years, unless by your verdict you ring that bell of justice in a tower so high that it resonates throughout this land that you have spoken, you have examined the evidence, that you have observed the law. That you have duly considered what was done to her, and what justice will be . . . . Your verdict stands as a symbol against the tyranny that was directed at Linda from the moment that she arrived at Daimler-Chrysler until today. And, unless that occurs, no one will hear. [You should return a verdict large enough] that every executive at Chrysler will know about the injuries suffered by Linda.

App. Vol. II, p. 1267-69a. An out-sized verdict was necessary, counsel told the jury, to ensure that what happened to Gilbert would "never [happen] again." *Id.* at 1206a. Undoubtedly mindful that DaimlerChrysler is a German company, counsel intoned: "Never again. Never again. That is the line now used by [Jews] in Israel, the land of Israel, to mean that the unspeakable horrors that were perpetrated [by the Nazis] on the Jews must never be forgotten and must never happen again. Never again." *Id.*

This none-too-veiled reference to the Holocaust formed something of a theme for Gilbert during the trial. At her counsel's urging, Gilbert's "expert" repeatedly likened the harassment she claims to have experienced to the treatment of "concentration camp" victims. By making these overt references to humanity's darkest moment, Gilbert, her counsel, and her expert suggested that when Gilbert's co-workers allegedly subjected her to dirty words and pictures, and to dismissive and uncooperative job-related mistreatment, the impact on her was in some respects qualitatively similar to the torture, slavery, starvation, infanticide, and, ultimately, mass extermination perpetrated on the victims of Nazi death camps.

The jury was asked to wreak vengeance, and it reacted. Gilbert won a jury verdict of $21 million.

7. (a) In affirming this verdict, the court of appeals charged DaimlerChrysler with notice, not just of the half-dozen incidents over seven years about which Gilbert complained, but of the additional 14,994 incidents she chose not to report *either* under the Company's harassment policy *or* in response to direct "is there anything else" questioning from Human Resources. The court concluded that Gilbert's determined silence on these unreported incidents was irrelevant. Once Gilbert told DaimlerChrysler that she had experienced a handful of incidents of misconduct, the court concluded, DaimlerChrysler was on "notice" that the "environment" was poisoned, and was obligated to discover the other incidents on its own, to find all the responsible parties, and to cleanse the environment, even in the face of Gilbert's determined efforts to keep the existence of those incidents, and the identity of the perpetrators, secret. The court acknowledged that the "amount of information known to the employer, and when it became known, is relevant to whether the investigation it undertakes and whether the remedy it puts in place is reasonably adequate." *Id.* But it held (a) that Gilbert was privileged to remain silent — indeed, to affirmatively mislead the Company's investigators, while (b) the half-dozen incidents Gilbert reported over seven years were sufficient to obligate DaimlerChrysler to resort to high

tech investigatory measures (like spy cameras and handwriting analysts) to unearth the possibility of other, unreported incidents and to identify those responsible.[5]

(b) The court also found that the trial court had acted reasonably in denying the Company's motion for remittitur. Applying abuse of discretion review, and devoting but one page of its 38-page opinion to the subject, the court allowed that "a different jury [might] have reacted differently to the evidence in this case and might have given Gilbert a smaller award" but concluded that jury "awards in different cases . . . are not particularly germane to whether the trial court erred in denying remittitur . . . ." App. Vol. I, p. 94a. The court noted the supposed evidence — "expert" medical testimony from a social worker about Gilbert's "brain chemistry" — that Gilbert "would die an untimely death because of the effects of the harassment," *id.*, and suggested that the jury's $21 million verdict actually was a model of restraint, given that Gilbert's counsel had asked for $140 million. *Id.*

SUMMARY OF ARGUMENT

1. Employers and employees share responsibility for ensuring a harassment-free work environment. The conscientious employer adopts vigorous policies and procedures to prohibit, uncover, and remedy offensive workplace conduct *before* that conduct matures into an unlawful hostile environment. It educates employees about its policies, and enforces those policies with rigor. It reacts promptly to complaints, and, in the process, assures participants discretion and protection from retaliation.

These efforts alone, however, cannot ensure a workplace free of harassment. When an employer has implemented a mechanism for addressing improper conduct, employees are

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[5] The court also relied upon vague and non-specific testimony of two co-workers that the one-on-one harassment was "obvious." The conduct referred to by these two co-workers, however, ended early in Gilbert's employment with DaimlerChrysler, when Gilbert moved to a different shift from the two individuals responsible for the misconduct. *See* slip op. at 10-11.

obliged to use it. When an employee subjected to uncivil conduct remains silent — or even worse, when such an employee subverts an employer's investigation by lying to or misleading investigators in response to direct questioning — the employer's policies cannot work effectively, no matter how well designed those policies may be or how well-intentioned the employer.

In this case, the court of appeals failed to appreciate the degree to which employers and employees must work in concert to end ongoing harassment and deter further misconduct. The court made three interrelated, fundamental errors that, unless corrected by this Court, will effectively undermine the public policy against harassment.

First, the court misperceived the degree to which an employer can be expected to ferret out workplace harassment in the absence of employee cooperation. The court concluded that the harassment in this case was so pervasive that DaimlerChrysler simply must have known about it. But the alleged harassment occurred on the floor of an automobile assembly plant covering about 2,000,000 square feet and employing 5,000 people, a noisy industrial setting where millwrights like Gilbert work all over the plant, usually with only one co-worker and out of the presence of supervisors. Under these circumstances, how was DaimlerChrysler's "higher management"[6] to know, for example, that a particular co-worker of Gilbert's called her a vulgar name unless Gilbert was willing to register a complaint? Absent a complaint from Gilbert — or regular, unannounced, and intrusive searches of Gilbert's things — how could these managers possibly have known that someone had placed a Penthouse magazine on Gilbert's toolbox?

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[6] "Notice" under the Civil Rights Act requires that "higher management" be aware of the harassment; it is not enough that co-workers or low-level supervisors have notice. *Jager v. Nationwide Truck Brokers, Inc.*, 252 Mich. App. 464, 475, 652 N.W.2d 503, 510 (2002); *Sheridan v. Forest Hills Pub. Sch.*, 247 Mich. App. 611, 621, 637 N.W.2d 536 (2001); *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 776-77 (6th Cir. 1996).

For the court of appeals, the apparent solution to the Company's investigatory and remedial responsibilities was to bug the workplace — to install surveillance cameras and listening devices — and to engage handwriting analysts to study bits of paper containing harassing comments left for Gilbert. App. Vol. I, p. 65a. But employers are obligated only to take investigatory steps that are *reasonable under the circumstances*. The court of appeals charged DaimlerChrysler with notice of events it could only have discovered (absent Gilbert's cooperation) through extraordinary investigatory steps — expensive and intrusive steps that could only have been justified by the existence of harassment far more serious or pervasive than the six relatively mild incidents of juvenile behavior Gilbert reported, incidents separated by as much as two years.[7]

Second, the court permitted Gilbert to recover for misconduct she consciously determined to conceal from DaimlerChrysler's investigators, even in response to direct questioning by Human Resources representatives. When an alleged victim of harassment affirmatively hinders the employer's efforts to prevent, identify, or punish harassment, he or she should generally be estopped from complaining that the employer should have done more to find and stop the alleged harassment, particularly the sort of one-on-one harassment comprising the 14,994 alleged incidents for which the jury was allowed to compensate Gilbert.

Gilbert was uniquely situated to see to it that the harassment stopped. She admitted that she knew who was responsible for "anonymously" harassing her, but when DaimlerChrysler asked her precisely this question, she claimed she did not. And she made this false claim because she *knew* that the Company would act promptly and aggressively against those responsible. She also was asked directly whether there were incidents of harassment *other than*

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[7] Gilbert presented no evidence that even these extraordinary steps would have yielded results, *e.g.*, that a handwriting analyst could have determined who was responsible for the anonymous acts of harassment.

the handful she had reported through the Company's harassment policy. To the Company's investigators she said "no"; to the jury she said, in effect, "yes, 14,994 of them." This case presents an appropriate vehicle for the Court to hold that, absent truly extraordinary circumstances, a complaining employee generally cannot recover for incidents of harassment she has affirmatively chosen to hide from her employer.

Third, the vast majority of the instances of misconduct about which Gilbert complained had no overtly sexual dimension. Instead, they were work-related disputes and resentments: disagreements about how Gilbert was to do her job, complaints about her frequent absences (related, she testified, to her alcohol abuse), dissension stemming from the perception of Gilbert's co-workers that their own safety was at risk because they were working so closely with someone abusing alcohol, and her co-worker's resentment about the apprenticeship program through which Gilbert had obtained her job (the co-workers were up-from-the-ranks "old school" employees).[8] As this Court has recently held, conduct of this sort, which allegedly "is gender based, but [is] not sexual in nature, does not constitute sexual harassment as that term is clearly defined in the [Civil Rights Act]." *Haynie v. State of Mich.*, No. 120426, 2003 WL 21349969 (Mich. June 11, 2003).

2. Gilbert asked the jury in this case for punitive damages. She did not utter that phrase, of course; punitive damages are unavailable under Michigan law. But her counsel urged the jury to punish DaimlerChrysler for its alleged misconduct and to send a message to "Auburn Hills [and] Stuttgart" by returning an enormous verdict.

When a lawyer urges a jury on to such a vindictive result and receives the sort of multi-million dollar result the jury returned here, the verdict is punitive in everything but name. And

[8] It was undisputed at trial that these sorts of disagreements and animosities were common among this workgroup and that male employees were also the victims of the sorts of teasing and abuse to which Gilbert claimed to have fallen victim.

because Michigan law precludes punitive damages in harassment cases, that verdict must be vacated.

But even if punitive damages were available under Michigan law, this verdict could not stand. As a matter of federal constitutional law, the court erred in according the verdict only "abuse of discretion" review. To meet minimum due process standards, the court would be obligated to give any punitive damages award *de novo* review. And to conduct this *de novo* review, the court would be obligated to consider "the degree of the . . . reprehensibility or culpability [of DaimlerChrysler's conduct], . . . the relationship between the penalty and the harm to the victim caused by [the Company's] actions . . . and the sanctions imposed in other cases for comparable misconduct . . . ." *Cooper Indus.*, 532 U.S. at 435. The court below did not conduct anything like this mandatory analysis; indeed, the court expressly *refused* to compare the judgment in this case to awards in similar cases to determine its propriety.

Had the court conducted the sort of review the U.S. Constitution requires, it could not have affirmed the judgment. The award bears no relationship to DaimlerChrysler's culpability. DaimlerChrysler was liable, at most, for what the court of appeals found to have been an insufficiently aggressive investigation, not for the harassment itself. A $21 million damage award, tainted by a substantial punitive component, cannot be premised on a supposedly negligent investigation.

Even if DaimlerChrysler's investigation had been deficient, Gilbert could have avoided any injury by simply telling DaimlerChrysler what she knew; the harassment could have been investigated and remedies found (as is evident from the Company's response to Gilbert's single complaint under the Company's policy about a face-to-face comment). Gilbert's own misrepresentations and omissions were directly responsible for any injury she suffered.

Finally, the jury award in this case was orders of magnitude greater than awards in similar cases. Indeed, most cases on comparable facts would never get to a jury, or would result in defense verdicts.

ARGUMENT

I. THE COURT BELOW MISUNDERSTOOD THE EXTENT TO WHICH AN EMPOYER CAN BE CHARGED WITH "CONSTRUCTIVE NOTICE" AS WELL AS THE LIMITS OF EMPLOYER RESPONSIBILITY IN INVESTIGATING THE ALLEGED HARASSMENT OF AN UNCOOPERATIVE COMPLAINANT

The federal and state laws prohibiting discrimination were designed primarily "to avoid harm [not] to provide redress . . . ." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)); *accord Jager*, 252 Mich. App. 404, 652 N.W.2d 503; *Graham v. Ford*, 237 Mich. App. 670, 677, 604 N.W.2d 713, 717-18 (1999) ("purpose of the [Elliott-Larsen] Civil Rights Act is to prevent discrimination . . . and to eliminate [its] effects") (internal citations omitted); *Hill v. American Gen. Fin., Inc.*, 218 F.3d 639, 644 (7th Cir. 2000) ("the goal of Title VII is prevention, not damages").[9] Because the discrimination laws "borrow[] from tort law the avoidable consequences doctrine [they] encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (citation omitted); *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) ("As an incentive to employers who implement reasonable procedures designed to prevent harassment of employees, there will be no liability if employees fail to take advantage of the procedures"). Thus, if a harassment victim "unreasonably fail[s] to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so." *Faragher*, 524 U.S. at 806-07.

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[9] *See also Jackson v. Ark. Dep't of Educ.*, 272 F.3d 1020, 1025 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001); *Parkins v. Civil Constructors*, 163 F.3d 1027, 1037 (7th Cir. 1998).

The decision below is at odds with these important societal interests. The verdict compensated Gilbert for acts of alleged harassment that she never reported to DaimlerChrysler — indeed, for behavior she affirmatively concealed from the Company. Holding her harmless for this obfuscation certainly promotes bigger judgments (and this case is an apt example), but it does nothing to end harassment. Indeed, by withholding information critical to DaimlerChrysler's efforts to investigate her claims, Gilbert "acted in precisely the manner a victim of sexual harassment should *not* act in order to win recovery." *Murray v. Chicago Transit Auth.*, 252 F.3d 880, 889 (7th Cir. 2001) (emphasis in original) (quoting *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000)). The Court should articulate a principle of law more consistent with the Act's purpose: "no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Faragher*, 524 U.S. at 806-07 (internal citations omitted).

A. The Law Of Harassment Cannot, And Does Not, Reward Complainants Who Refuse Even The Most Basic Cooperation With The Employer's Investigation

As a matter of law, the six incidents of misconduct reported by Gilbert over a period of seven years did not amount to an unlawful hostile environment. The laws proscribing sexual harassment do not amount to a "general civility code," *Brewer v. Hill*, No. 208872, 2000 Mich. App. LEXIS 1033, at *21 (Sept. 15, 2000), and sporadic incidents of boorish or juvenile behavior are insufficient to make out a claim of sexual harassment. *Radtke v. Everett*, 442 Mich. 368, 394, 501 N.W.2d 155 (1993).[10] What Gilbert reported to her employer was no more than

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[10] *See also Duncan v. GMC*, 300 F.3d 928 (8th Cir. 2002) (sexual overtures, inappropriate touching and exposure to pornography were "boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment"), *cert. denied*, 123 S. Ct. 1789 (2003); *Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002) (no sexual harassment based on infrequent and episodic incidents; more than half of the incidents lacked a sexual overtone and those with sexual overtone were difficult to remedy because they were largely anonymous); *Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 754 (7th Cir. 2002) (department chief's eight gender-related comments insufficiently severe as a matter of (continued...)

that: two cartoons, a sex advice column, a sexually explicit picture, a poem with a sexual theme, and a vulgar word, these separated by months if not years.

But the central purpose of an anti-harassment policy like DaimlerChrysler's is to address unprofessional conduct *before* it can ripen into a legal liability — to put a stop to uncivil conduct *before* it matures into an actionable hostile environment . Accordingly, in response to Gilbert's complaints about cartoons and pictures, the Company investigated, interviewed Gilbert and others in her work area, reinforced its policy against harassment to the entire group, and, with respect to the one incident in which the misbehaving individual could be identified, it imposed discipline.

These steps appeared effective. After the two initial complaints in the Spring of 1993 (and DaimlerChrysler's response), Gilbert made no further complaints for more than a year. When she did complain again, DaimlerChrysler took action, and again, there was no further complaint for six months. After the investigation resulting from Gilbert's next complaint, *more than two years* passed before another complaint was raised. Given the substantial gaps between these incidents, and the lack of any evidence that the same individuals were responsible for them, DaimlerChrysler was entitled to believe that its remedial actions had been effective in curbing the problem. *See Mikels v. City of Durham*, 183 F.3d 323, 330 (4th Cir. 1999) ("great weight [is

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(...continued)

law – the comments were "indeed offensive" but "too isolated and sporadic to constitute severe or pervasive harassment"; "Title VII does not mandate admirable behavior from employers, and [the supervisor's] conduct, though offensive, thus falls short of 'severe' or 'pervasive' harassment"); *Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 82 (1st Cir. 2001) (no hostile environment where co-workers used "sexually charged profanities," made obscene gestures, and repeatedly asked plaintiff personal questions); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981 (6th Cir.) (summary judgment affirmed because conduct was not sufficiently severe or pervasive; two offensive remarks and a single battery in a six-month period are insufficient), *cert. denied,* 531 U.S. 928 (2000); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000) (five instances of harassment over six months by a partner at a large law firm; conduct was not severe or pervasive enough).

given] to the fact that a particular response was demonstrably adequate to cause cessation of the conduct in question"); *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997) ("A remedial action that effectively stops the harassment will be deemed adequate as a matter of law").

This handful of incidents, however, was all but irrelevant to the hostile environment for which the jury was allowed to compensate Gilbert. Gilbert recovered for "daily" incidents of alleged harassment about which she never complained to her employer.

The court of appeals offered an idiosyncratic and dangerous conception of "notice" in support of this result. A complainant's obligation, the court observed, is simply to inform the employer that misconduct is occurring — that "a hostile environment exists." App. Vol. I, p. 76a. This, in the court's view, discharges the employee's duty and triggers the employer's obligation to ferret out the harassment and the harassers, with or without the complainant's help. Indeed, the court dismissed as having "no merit" the proposition that a complainant has an obligation to assist the investigation, or even to provide the names of her harasser. *Id.* And if the employer, acting without even the most basic facts known to the complainant, fails to find and punish the harasser, damages result.

The court offered no case law, from this jurisdiction or any other, to support this remarkable conception of notice, because the settled law is to the contrary: a plaintiff "should not recover damages that could have been avoided" had she cooperated with the employer. *Faragher*, 524 U.S. at 807 (internal citations omitted). "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id.* As the Fourth Circuit has observed:

> Reporting the harasser benefits the victim by allowing the company to halt future harassment. It benefits others who might be harassed by the same individual, and it benefits the company by alerting it to the disruptive and unlawful misconduct of an

> employee. Thus, the reporting requirement serves the "primary objective" of Title VII which "is not to provide redress but to avoid harm.

Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 267 (4th Cir. 2001) (citation omitted); *see also O'Dell v. Trans World Entertainment Corp.*, 153 F. Supp. 2d 378, 390 (S.D.N.Y. 2001) ("Employees must be required to accept responsibility for alerting their employers to the possibility of harassment") (internal quotation marks and citation omitted), *aff'd*, No. 01-7807, 2002 WL 1560266 (2d Cir. July 16, 2002) .

Ward v. City of Streetsboro, 89 F.2d 837,1996 U.S. App. LEXIS 19085, at *15 (6th Cir. June 24, 1996) (unpublished op.), *cert. denied*, 519 U.S. 1092 (1997), in which this principle was applied, bears an uncanny resemblance to this case. The plaintiff there "frustrated the efforts of defendants to take prompt remedial action by refusing to report the harassing incidents immediately" and, although "she knew [one of the individuals] who had threatened her, . . . she refused to tell the [employer] who it was." An employer, the court reasoned, "cannot stop something whose source is unknown," and the plaintiff's failure to cooperate — to tell the employer who was responsible for the harassment — prevented her from recovering. *Id.* at *13. *See also Hill*, 218 F.3d at 643 (plaintiff failed to take necessary steps to end harassment where she reported the misconduct anonymously and she was not candid with investigator); *Meadows v. County of Tulare*, 191 F.3d 460, 1999 U.S. App. LEXIS 21083, at *5 (9th Cir. Sept. 1, 1999) (plaintiff failed to prevent harm where she failed to complain on a timely basis, failed "to complain specifically about [a co-worker's] use of racial epithets . . . before completion of the investigation, and [refused] to assist the independent investigator in his investigation")

(unpublished op.); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 677 (10th Cir. 1998) ("Plaintiff would not disclose names, [so the employer] could not discipline individual harassers").[11]

Gilbert knew who was responsible for harassing her, but she refused to give the Company this information *precisely because she knew DaimlerChrysler would act — promptly and effectively — to end the harassment.* Gilbert was interested in stopping the harassing behavior only if she was left out of the process altogether; she did not want to accept responsibility for the fact that DaimlerChrysler was certain to discipline — and perhaps even terminate — those responsible. As previously noted, by choosing to remain on the sidelines, Gilbert "acted in precisely the manner a victim of sexual harassment should *not* act in order to win recovery." *Murray*, 252 F.3d at 889 (quoting *Shaw*, 180 F.3d at 813).

Without any citation or analysis, the decision below sets harassment law in this State on a course that diverges sharply from federal law and from the law in other states, and it does so, unlike the Court's decision in *Chambers*, in a way that undermines the central goals of civil rights laws, state and federal. There is no sound reason for showering damages on uncooperative plaintiffs when even minimal cooperation could have ended the misconduct *before* a hostile environment was created. This Court should repudiate the court of appeals' mistaken notion that employee cooperation is optional — or even irrelevant — and that obfuscation should be rewarded.

B. The Scope Of An Employer's Duty To Investigate Is Context-Dependent

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[11] *See also Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999) (summary judgment for employer affirmed where plaintiff lied to or misled investigator); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) (summary judgment for the employer; plaintiff testified that he chose not to report the harassment to his supervisor because he was afraid of the repercussions; "At some point, employees must be required to accept responsibility for alerting their employers to the possibility of harassment. Without such a requirement, it is difficult to see how Title VII's deterrent purposes are to be served, or how employers can possibly avoid liability in Title VII cases").

There is a remarkable circularity to the reasoning of the court below: The unreported harassment of Gilbert was pervasive and substantial; DaimlerChrysler would have known about this allegedly extensive campaign of harassment, and would have apprehended the guilty parties, had it done a much more thorough investigation; and a more thorough investigation was demanded by the seriousness and frequency of the unreported harassment.

Imagine, however, the required scale and intensity of an investigation that might have unearthed the types of misconduct Gilbert so determinedly hid from the Company. The plant covers approximately 2,000,000 square feet, employs 5,000 workers, and, as an industrial manufacturing facility, produces considerable noise. Gilbert and her co-workers repair machinery all over the plant, usually without supervisors in close proximity. Without Gilbert's help — and short of "engag[ing] in an Orwellian program of continuous surveillance" — it seems doubtful that DaimlerChrysler could ever have learned about the sorts of allegedly discriminatory conduct Gilbert chose not to report (mostly one-on-one interactions with co-workers). *Jeffries v. Department of Soc. & Rehab. Servs.*, 147 F.3d 1220, 1230 (10th Cir. 1998) ("an employer is not required to engage" in such an Orwellian program of surveillance) (quoting *Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1019 (7th Cir. 1996)).

The court of appeals, however, prescribed exactly this sort of Orwellian snooping. Malefactors could have been identified, the court concluded, had DaimlerChrysler only resorted to spy cameras and handwriting analysts.[12] But the extent of an employer's investigatory and remedial obligations can only be defined contextually, by the circumstances of each case. *See, e.g., Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997) ("the appropriateness of a response depends on the frequency and severity of the alleged harassment"),

[12] The Company, of course, was not free simply to start spying on its employees. This plant is a union shop, and the unilateral decision to mount surveillance cameras (or bugs to pick up the epithets about which Gilbert complained) would have violated the Company's duty to bargain with the UAW. *See, e.g., Colgate-Palmolive Co.*, 323 NLRB 515 (1997).

cert. denied, 522 U.S. 1110 (1998). An employer responding to allegations of sexual assault or threatened violence may well be obligated to take extraordinary steps to investigate, perhaps even electronic surveillance. Employers responding to a claim that one worker left a vulgar poem or a cartoon where others could see it, or used common, but vulgar and offensive language, with another have an obligation to take action, but the intensity of that action, and the expectations of reviewing courts, must be calibrated to the alleged misconduct. No one threatened Gilbert's safety; DaimlerChrysler was entitled to take these circumstances into account when it decided on a proportionally appropriate response.

That is not to suggest, however, that an employer is entitled to turn a blind eye to working conditions at its facilities, nor does the Chamber suggest that the Court should read the notion of constructive notice out of harassment law. There will certainly be circumstances when an employer is obligated to take action (or properly will be found liable for failing to take action) even in the absence of a complaint. That should most often occur when the employer has failed to provide the sort of complaint procedure the civil rights laws were designed to foster. But when an employer *has* a clearly articulated harassment policy and an adequate complaint procedure in place, it is the *employee's* obligation in the first instance to bring instances of misconduct to the employer's attention. In an industrial setting like this one, where thousands of employees mingle over millions of square feet of space, it is simply not realistic to expect "higher management" to be aware of spoken words between co-workers on the shop floor, or the other sorts of boorish conduct at issue here.[13]

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[13] *See Farley v. American Cast Iron Pipe*, 115 F.3d 1548, 1554 (11th Cir. 1997) ("Where there exists an effective policy . . . the employer has made reasonably diligent efforts to learn and know of the conduct of its employees. Stated differently, . . . once a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to 'know what is going on' within the company; beyond this point, it

(continued...)

C. The "Notice" DaimlerChrysler Received In The Depositions Was Ineffective

The court of appeals observed that DaimlerChrysler's lawyers were told about additional instances of harassment during Gilbert's deposition and, imputing the lawyer's knowledge to DaimlerChrysler, concluded that this added quantity of misconduct increased the Company's investigatory and remedial obligations. Federal law is to the contrary. Where an employer has established an effective policy against harassment and has clearly articulated a reporting procedure, a complaining employee is obligated to follow that procedure. While only a foolish employer would ignore complaints that may arise from other sources or in other contexts, complaints made outside that procedure do not trigger the employer's legal obligations. *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir.) (complaints to managers other than those identified in employer's policy failed to trigger employer's duty to respond), *cert. denied*, 531 U.S. 926 (2000). This rule serves the important purpose of encouraging employers to establish functionally adequate procedures and fosters the most effective and expeditious mechanism for *ending the harassment*, the central goal of civil rights laws. *Gawley*, 276 F.3d at 312 ("As an incentive to employers who implement reasonable procedures designed to prevent harassment of employees, there will be no liability if employees fail to take advantage of the procedures"). The Court should use this case as an opportunity to so hold.

But in this case, the "notice" Gilbert provided in her deposition would have been ineffective in any event. Gilbert described to the Company's lawyers a variety of mistreatment to which she allegedly had been subjected: she was called a vulgar name, co-workers yelled at her and refused to help her with her work, her toolbox was blocked several times, her belongings were knocked over, and she was the object of what she called "innuendos" from her co-workers.

(...continued)
is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances").

The court of appeals expressly faulted DaimlerChrysler for failing to address these allegations adequately. But most of these allegations related to conduct occurring months and years before the deposition sessions. Gilbert identified at the deposition the individuals responsible for certain specific instances of alleged harassment, but by the time of the depositions, the identified employees had already left DaimlerChrysler, and therefore could not be counseled or disciplined. As to other allegations of anonymous misconduct, one might reasonably ask how the Company could have responded in November, 1994, for example, to the allegation that in 1992, someone had blocked Gilbert's toolbox several times. At some point such allegations become too stale to be investigated, much less to lead to discipline. *See, e.g.*, *Gawley*, 276 F.3d at 312 (plaintiff failed to act reasonably, and could not recover, because of her delay of seven months in reporting harassment); *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999) (plaintiff unreasonably failed to take advantage of the employer's preventive or corrective opportunities or to avoid harm because she waited almost two years to complain).[14]

The civil rights laws impose obligations on both employers and employees with respect to preventing harassment. Employers must act reasonably to proscribe, prevent, and punish harassing conduct. Employees have an obligation to assist the employer in these endeavors. The Court should use this case (a) to reaffirm the principle that the employer's efforts are bounded by reason, informed by all the circumstances; and (b) to adopt the federal rule that when a complaining employee chooses to thwart the employer's reasonable remedial efforts by failing to report incidents as specified in the employer's anti-harassment policy, by delaying reports of misconduct, by withholding critical information, or by misleading the company's investigators, damages are unavailable.

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[14] *Cf. National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (unreasonable delay can render incidents of harassment time-barred).

II. THE JURY WAS PERMITTED TO COMPENSATE GILBERT FOR CONDUCT THAT WAS NOT "OF A SEXUAL NATURE"

Gilbert told the jury in this case that she had been subjected to "daily" incidents of harassment, but *most* of the conduct about which she testified was not sexual in nature. There were disagreements with her co-workers regarding how Gilbert was to do her job; her co-workers complained often about her frequent absences (related, she testified, to her alcohol abuse); the co-workers were unhappy about the safety implications they perceived because they were working so closely with someone abusing alcohol; and, Gilbert testified, co-workers resented the apprenticeship program through which she had obtained her job (they were up-from-the-ranks "old school" employees).[15] Although Gilbert contended that she had been singled out for this alleged mistreatment because of her sex, the specific actions about which she complained were not *about* her sex, *i.e.*, they were not "of a sexual nature." M.C.L. § 37.2103(i).

Quite recently, this Court held that under the Michigan Civil Rights Act, M.C.L. § 37.2101, "conduct or communication that is gender-based, but is not sexual in nature, *does not constitute sexual harassment* as that term is clearly defined in the [Civil Rights Act.]" *Haynie v. State of Mich.*, No. 120426, 2003 WL 21349969, at *1 (Mich. June 11, 2003) (emphasis added). The jury rendered a verdict based on alleged harassment occurring "daily," but according to *Haynie*, it should never have been permitted to consider most of the conduct upon which Gilbert relied. The verdict, then, was irretrievably infected with error, and should be vacated.

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[15] DaimlerChrysler filed a table cataloguing the various allegations Gilbert made at trial. *See* Attachment B to DaimlerChrysler's Reply in Support of Leave to File. The chart makes plain the fact that the great majority of Gilbert's complaints did not relate to conduct of a "sexual nature."

III. THE COURT SHOULD SET STANDARDS FOR DETERMINING WHEN SO-CALLED COMPENSATORY DAMAGE AWARDS BECOME PUNITIVE IN EFFECT

A. The $21 Million Verdict Was Punitive In Everything But Name, And Thus Was Impermissible Under Michigan Law

Since at least 1884, damages intended to punish a defendant or "send a message" to prevent recurring wrongdoing have been unavailable under Michigan law. *Veselenak v. Smith*, 414 Mich. 567, 572, 327 N.W.2d 261, 263 (1982) ("award of exemplary [formerly punitive] damages [is available only to compensate] for injury to feelings"); *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 419, 295 N.W.2d 50, 55 (1980) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant"); *Jackson Printing Co. v. Mitan*, 169 Mich. App. 334, 341, 425 N.W.2d 791, 794 (1988) (where available, "purpose of exemplary damages is not to punish the defendant, but to render the plaintiff whole"). And more specifically, it has long been clear that neither punitive nor exemplary damages are available under Michigan's Elliott-Larsen Civil Rights Act. *See Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 51-55, 427 N.W.2d 488, 498-500 (1988).

Gilbert, however, plainly wanted punitive damages, and devoted a substantial part of her closing arguments to obtaining them. Her counsel urged the jury to return a verdict that would "be heard from the floor of that plant on Jefferson to the board room in Auburn Hills or Stuttgart." He asked the jury "to ring the bell of justice loud . . . and high . . . in that tower of justice" so "that this shall never, ever, ever, ever happen again . . . ."[16] He argued that the jury should make its verdict "a symbol against the tyranny that was directed at Linda from the moment that she arrived at Daimler-Chrysler." He wanted a verdict, he told the jury, so large "that every executive at Chrysler will know about the injuries suffered by Linda."

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[16] This aspect of the closing argument harkened back to the parallels drawn by Gilbert between her alleged treatment by DaimlerChrysler and the treatment of concentration camp victims. *See* n.4 *supra*.

This impassioned jury speech, delivered over DaimlerChrysler's objections (and drawing only a meaningless "curative" direction to "follow the instructions"),[17] worked perfectly for Gilbert, netting her $21 million. The damages were not denominated as punitive or exemplary of course, but it is obvious from the manner in which the case was argued and the size of the award that the jury's intent was to do precisely what Gilbert's lawyer asked it to do — to send a message and impose a punishment. An inflammatory "closing argument [like this,] together with the amount of the award, is sufficient evidence to justify [the] conclusion that the jury awarded punitive damages as well as actual damages" *regardless* of how the damages were characterized on the verdict form. *Evers v. Equifax, Inc.*, 650 F.2d 793, 795 (5th Cir. 1981) (where plaintiff's counsel urged jury to "award sufficient damages to prevent a recurrence of similar incidents" in case where no punitive damages were available, and new trial warranted); *see also Smith v. Kmart Corp.*, 177 F.3d 19, 26 (1st Cir. 1999) (counsel's argument, that jury should "send a message" that conduct would not be tolerated was request for punitive damages, impermissible in this case); *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998) (adopting *Evers* standard for analyzing putative compensatory damage awards; noting that size of jury award in that case did not suggest punitive intent by jury).

The impact of this case on the development of Michigan law could hardly be more profound. The opinion has received widespread attention in the press — a $21 million verdict for a current employee who has not lost a day's wages, in a case involving no unwanted touching, propositions, or threats. The decision below elevates form over substance, and allows the label assigned to a damage award on the verdict form to govern the determination of whether the award is actually compensatory or punitive. If a plaintiff is permitted to make a punitive

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[17] The court told the jury that "the argument of counsel . . . is not to be considered by you as the law that you are to apply in the case. We have already given you the instructions of law as to the proper elements of damage and how to compute damage. So, if you heard anything that is in conflict with what the Court told you with regard to that, then disregard what the lawyers say and rely on your memory of the Court's instructions." Slip. op. at 23.

damages speech during closing arguments — to urge the jury to "send a message" with their verdict — while denominating the damages as "compensatory," the long-established Michigan rule regarding punitive damages will be a dead letter. It is essential that the Court repudiate punitive damage awards masquerading as compensatory damages.

B. The Constitution Is Implicated If Damages Of This Magnitude Motivated By Punitive Intent Are Permitted To Stand

The Supreme Court of the United States has made clear that:

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*). The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-455, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) (plurality opinion).

Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2001).

This core constitutional concern, harkening back to the Magna Carta, *see Gore*, 517 U.S. at 587 (Breyer, J., concurring), requires that a reviewing court conduct a *de novo* assessment of any punitive damage award to ensure that it meets constitutional standards, considering in each case "the degree of the defendant's reprehensibility or culpability [of conduct], . . . the relationship between the penalty and the harm to the victim caused by [the Company's] actions . . . and the sanctions imposed in other cases for comparable misconduct . . . ." *Cooper Indus.*, 532 U.S. at 435 (internal citations omitted).

These constitutional requirements cannot be evaded by labeling a huge damage award procured through an appeal to passion, prejudice, and punishment, as "compensatory." The U.S. Supreme Court recently clarified that:

> Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Cooper Indus., 532 U.S. at 432 (internal citations omitted).

Judicial efforts to insulate punitive damage awards from constitutional review by calling them "compensatory" are no more effective than legislative schemes intended to insulate such awards from mandatory constitutional review. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994) (finding legislative effort to limit scope of review of punitive damage awards to "substantial evidence" standard unconstitutional). The simple fact is that "[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated . . . ." *TXO Prod.*, 509 U.S. at 467 (Kennedy, J., concurring).

No constitutionally adequate review was conducted in this case, and the verdict in this case could not survive such a review:

1. The award bears no relationship to *DaimlerChrysler's* alleged wrongdoing (as opposed to the wrongdoing of the alleged harassing employees). In cases of co-worker harassment, the employer is not liable for the sexually harassing misconduct itself, which by definition is committed by individuals acting outside the scope of their employment, but only for

its own failure to prevent the harassment or react adequately to an existing hostile environment. *See, e.g., Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999); *see also Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999) (collecting cases), *cert. denied*, 530 U.S. 1215 (2000). Thus — even assuming the propriety of a liability verdict in this case — DaimlerChrysler was culpable, at most, for what the court of appeals found to have been an insufficiently aggressive investigation, not for the harassment itself. Punitive damages are never available for pure negligence.[18] Even assuming, *arguendo*, that there was more than simple negligence involved here, a $21 million punitive damage award cannot be justified by any characterization of DaimlerChrysler's alleged inaction, especially where the Company took effective steps to remedy harassment reported by Gilbert under its harassment policy. *Compare with Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001) (affirming punitive damage award of $50,000 for failure to train managers).

2. In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), the Court reiterated the long-established rule that there must be a rational relationship between compensatory and punitive damages.[19] The award in this case grossly overstated the role of DaimlerChrysler's actions in causing the alleged harm suffered by Gilbert. Even if DaimlerChrysler's investigations were deficient, it was within Gilbert's power to render those investigations largely irrelevant; she could simply have told DaimlerChrysler what she knew. Gilbert's own misrepresentations and omissions during DaimlerChrysler's investigation constituted an intervening and supervening cause of any injury she claims. *See Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564, 569-70

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[18] *See* Dan B. Dobbs, *Law of Remedies: Damages-Equity-Restitution* § 3.11(2), at 319 (1992) ("ordinary negligence alone will never qualify" for punitive damages).

[19] Where a damage award labeled as compensatory contains both compensatory and punitive elements in a single sum, it is impossible to perform the necessary comparison between the punitive award and the harm done because one cannot know how the jury intended to allocate the damages. That fact alone would warrant a retrial in this case.

(7th Cir. 2001) (plaintiff's failure to register meaningful complaint reasonably designed to end the harassment precludes punitive damages award).

3. The award was orders of magnitude greater than awards in similar cases. Most cases on comparable facts would never get to a jury, or would result in judgments for the defense. *See, e.g.*, cases cited at n.10. Here, the court of appeals affirmatively *refused* to address the relationship between the jury's award here — based on facts that the court acknowledged placed the case "somewhat lower on the continuum of harassment" than the most serious cases — and the awards rendered in other harassment cases, a mandatory feature of due process review. App. Vol. I, p. 75a. This is the single largest harassment damage award, not only in Michigan history, but anywhere in the United States. It comes in a case in which there was no sexual assault, no touching, no propositions — and no threats of such misconduct — and where the plaintiff did not lose a single day's wages.[20]

4. Finally, the federal constitution demands that juries be adequately instructed on the subject of punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). That duty was plainly breached in this case; the trial judge made only a single passing reference during the jury charge regarding the exclusively compensatory nature of available damages, and when Gilbert's counsel appealed for a vindictive judgment, the court refused to issue an appropriate curative instruction. Of course, in this case, the proper curative instruction would have informed the jury unambiguously that such damages were not available, that they were not allowed to "send messages" or "ring bells of justice," as requested by Gilbert's lawyer.

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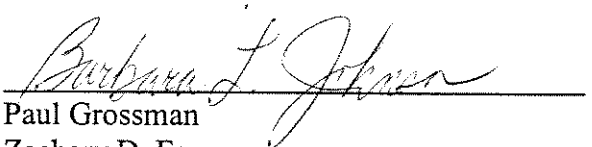
[20] Had Gilbert sued for the same conduct under the applicable federal statute, Title VII, and prevailed, she would have been limited to a compensatory and punitive damage award of $300,000 *combined.*

CONCLUSION

The court of appeals' opinion in this case destabilizes Michigan law, and sets it apart from federal law and the law of other states, in ways that undermine the purposes of the Civil Rights Act. It demands an unprecedented and unjustifiable level of intrusive surveillance — or perfect omniscience — by employers. It creates perverse incentives by rewarding plaintiffs who choose to keep silent about misconduct, even in the face of direct questioning by the employer, and who affirmatively seek to mislead or obstruct employer harassment investigations. It rewards them with damages they easily could have avoided through cooperation. It sanctions the use of "compensatory" damages to punish and "send messages" to defendants. It subjects these punitive damages in disguise to the least searching inquiry possible, instead of the *de novo* review that the U.S. Constitution requires, and it all but assures that these disguised punitive damages will not meet minimum due process standards.

Alone, any one of these egregious mistakes by the court of appeals would justify reversal. In combination, they compel it.

Respectfully submitted,



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